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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92058162
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Alexander Kronik,	)	
	)	
Petitioner,	)	Cancellation No. 92058162
	)	Registration No. 4094706
	)	Mark: ALIKEU
v.	)	
	)	
Sayed Najem,	)	
	)	
Respondent.	)	
	)	
	)	

PETITIONER'S REPLY BRIEF

I. INTRODUCTION

Petitioner, Alexander Kronik ("Petitioner"), seeks to cancel US registration No. 4094706 for the mark ALIKEU on the grounds that Petitioner has prior use of its mark ALIKE for downloadable social networking software, which is highly similar and likely to cause confusion with Respondent's registered mark ALIKEU for nearly identical on-line social networking services.

The preponderance of the evidence shows that Petitioner began using the word ALIKE as a trademark for downloadable social networking software long prior to Respondent's first use of ALIKEU for on-line social networking services, and well prior to the filing date of Respondent's intent-to-use application for ALIKEU, which matured into the petitioned registration. Moreover, the marks ALIKE and ALIKEU are virtually identical, and Petitioner's downloadable social networking software is highly related to Respondent's online social networking services. The marketing and trade channels are also identical. Accordingly, Petitioner respectfully requests that the Board cancel Respondent's Reg. No. 4094706 for ALIKEU based on Petitioner's prior and

superior rights in his ALIKE mark.

Petitioner regrettably could not file a timely trial brief. Respondent, having a full opportunity to address Petitioner's allegations in his complaint, and its counsel having attended the lengthy deposition of Alexander Kronik on December 12, 2015, chose to ignore the ample testimony and documentary evidence Petitioner introduced to demonstrate his prior use of ALIKE— as if the deposition somehow never occurred. Petitioner hereby submits this Reply brief specifically to rebut Respondent's blatantly misleading argument that Petitioner has introduced no evidence of prior use of ALIKE, which is simply untrue and ignores the extensive evidentiary record in this case.

II. THE RECORD BEFORE THE BOARD

Petitioner has made of record the following materials:

Trial Deposition of Petitioner, Alexander Kronik	Date: December 12, 2014
Trial Deposition of Jeannie Willis of Apple, Inc.	Date: December 10, 2014
Petitioner's Notice of Reliance	Date filed: December 16, 2014

III. STATEMENT OF FACTS

A. Petitioner's First Use of ALIKE for Downloadable Social Networking Software in September of 2010

Petitioner is a software developer. He received extensive education in building mobile applications and worked as a mobile developer contractor for number of years. Deposition of Alexander Kronik ("Kronik Depo"), TTABVUE Dkt. No. 30, p.11. In 2008, he conceived and began developing a downloadable social networking software application called **ALIKE**. *Id*. at 14.

ALIKE is a computer application software for mobile phones and desktop computers which enables users to check into establishments, match and share photographs and pictures, and interact on the basis of geographic proximity and keyword tagging. More specifically, ALIKE is a proximity-based, keyword driven search engine for mobile or a platform for tag-geofencing. Basically, it is a social networking app that allows users to find other similar users on the basis of similar words or things they like. People can identify themselves by particular tag in a certain proximity, geofence themselves and then interact with other users, send messages, files, create groups, events and so forth. *Id*. at p. 12, ln. 5. It allows people to find other users with similar interests— "alikes"— and create communities online and in real life based on a real-time proximity.

In 2008, Petitioner begun actively working on mock ups and wireframe designs for the ALIKE application, and hired a contractor named Radha Fitch to assist him with creating the style and branding for ALIKE. *Id.* at p. 13; p. 29, ln. 18. The first marketing materials with the name ALIKE and logo design appeared in 2009, and Petitioner distributed them publicly at various trade shows starting in 2010. *Id*. at p. 143, ln. 21.

Finally, in the fall of 2010, the downloadable social networking software application ALIKE was completed and uploaded into the Apple "Itunes" Appstore for public distribution and use. *Id*. at p.15. **The first download of ALIKE social networking software, as demonstrated by Apple's business records—and authenticated by the deposition testimony of Apple representative Jeannie Willis—was on September 14, 2015**. Deposition of Jeannie Willis ("Willis Depo"), TTABVUE Dkt. No. 29, Ex. B (Itunes download records showing downloads of ALIKE software). **The documents show consistent downloads of the ALIKE software by U.S. consumers between 2010 and 2013**. **Respondent has not disputed these records or that the**

downloads occurred. Rather, Respondent chose to *ignore* the Apple records altogether in its Trial Brief as if Apple never produced the documents. These documents clearly demonstrate Petitioner's prior use of ALIKE for downloadable social networking software, with the first download occurring in 2010.

To upload the ALIKE software to the Itunes store, Petitioner used Apple's standard procedure for authenticating himself as the developer and accessing Apple's "Itunes Connect"—the portal designed by Apple for submitting mobile application software for acceptance and download by consumers through Apple's Appstore. Kronik Depo. at 17, ln. 22. Petitioner used the Apple username "ADAM ID" and the alias "Smartphone Supreme" when corresponding with Apple. *Id*. at 124, 135. Between 2010 and 2013, Apple's "Itunes Connect" portal generated—and Petitioner downloaded—various periodic analytics reports showing the number of Petitioner's downloads of ALIKE software across different platforms, and the various countries where consumers downloaded the software (including the United States), among other statistical information about the ALIKE software. Kronik Depo, 93-94; 106-123; Exs. K-Q. Apple's analytics show that there were around 85 downloads of the ALIKE application in the United States in 2010 alone. There were numerous additional downloads in other countries as well: Apple's documents also show the territory of downloaders in the United States, Europe, Africa, the Middle East, India, and Latin America between 2010 and 2013. *Id*.

To indicate the version of Petitioner's ALIKE application, the extension "alpha" was sometimes added to the name ALIKE. *Id*. at 41-45. "Alpha" is not part of Petitioner's ALIKE trademark, but is merely a descriptive term for the first version of the software. All of Petitioner's marketing materials and Apple software submission documents refer to the trademark ALIKE as the name of the application, not "ALIKE alpha." *Id*.

In November of 2010, Petitioner created an ALIKE website at the domain *www.alikeit.net*, which was intended to represent the concept of the app through a website portal. The webpage showed the same word ALIKE as displayed for the software on the Apple Itunes store, and was visually consistent with the look and feel of the application. Some features and pages *on the website* were in "demo" mode (i.e., not yet fully functional) but linked users to the Apple Itunes store to download the functional ALIKE software so that they could enjoy the full social-networking experience. *Id.* at 31, ln. 23. However, the website was merely promotional material for the downloadable software; *id*. at 168-169*;* and Petitioner is not relying on the website promotional materials to establish priority of use of his ALIKE mark for downloadable software. Rather, the Apple download records and ample download statistics generated by Apple's "Itunes Connect" portal clearly demonstrate the Petitioner's ALIKE software was actually downloaded by consumers at least as early as September 14, 2010. Since 2010, consumers have continued to download and use the ALIKE software. *Id*. at p. 32, ln. 5.

Accordingly, Petitioner has priority of use of ALIKE for its downloadable social networking software with priority of use established at least as early as November 14, 2010.

B. <u>Respondent's Junior Use and Intent-to-Use Application for ALIKEU in 2011</u>

Respondent operates an on-line social networking service called ALIKEU, which is very similar to Petitioner's ALIKE downloadable social networking software. On April 25, 2011, Respondent filed his trademark application for ALIKEU based on his intent to use the mark for "online social networking services." Respondent later filed a Statement of Use and completed the registration. Respondent first used **ALIKE U** for his social networking site on **July 25, 2011**. Specifically, Respondent stated that his website went live on July 25, 2011. Deposition of Sayed Najem, pg. 55, ln. 1-2; Respondent's Final Trial Brief at p.10.

Because Respondent's first use of his mark ALIKEU was after he filed his intent to use application, the earliest priority date upon which Respondent can rely is April 25, 2011, the filing date of his trademark application.

Petitioner's and Respondent's social networking software is essentially the same, both having the same functions, such as finding other users by geographic proximity, types of interests, and by keywords. Thus the goods and services are highly related. The words ALIKE and ALIKEU are also nearly identical, as Respondent merely added the letter "U" to Petitioner's trademark ALIKE. Because the marks ALIKE and ALIKEU are nearly identical and the services are highly related, Petitioner is entitled to judgment cancelling the ALIKEU registration.

IV. STANDING

Petitioner's standing is inherent because his U.S. Trademark Application Serial No. 85/595,094 for ALIKE (& Design) was twice refused based on the finding of likelihood of confusion with Respondent's ALIKEU Registration. Notice of Reliance, TTABVUE Dkt. #17, Ex. B-C (USPTO refusals of Petitioner's application); *Jewelers Vigilance Committee, inc. v. Ullenberg Corp.*, 823 F.2d 490, 493 2 USPQ 2d 2021, 2023 (Fed. Cir. 1987) (rejection of a trademark application pursuant to Lanham Act § 2(d) is sufficient to establish standing). Petitioner has been damaged by Respondent's ALIKEU registration in that Petitioner has been unable to register his ALIKE (& Design) mark—which features ALIKE as the dominant portion of the mark. Accordingly, Petitioner has shown standing to petition to cancel the ALIKEU registration.

V. ARGUMENT

A. Petitioner has Priority of Use of ALIKE

The first download by consumers of **ALIKE** software occurred on September 14, 2010, as shown by Apple's authenticated business records containing detailed information about ALIKE

downloads between 2010 – 2013. Willis Depo. at 9, Ex. B. These downloads were personally authenticated by Jeannie Willis, an Apple representative with personal knowledge about Apple's download records. Willis Depo at 9, Ex. B. Other Apple records, such as periodic reports containing analytics of ALIKE software downloads, show that during 2010, there were 85 downloads of the ALIKE software in the USA by various users, and further downloads in other countries around the world. Kronik Depo. at 93-94; 106-123; Exs. K-Q (Apple analytics reports). Importantly, **Respondent does not dispute that these downloads occurred between 2010-2013.** Respondent's Trial Brief is silent on these downloads, suggesting Respondent sought to avoid drawing attention to the fact they occurred.

In an apparent attempt to shift attention away from the undisputed downloads of ALIKE software, Respondent presents a number of spurious arguments for why the Board should not find the priority use in favor of Petitioner:

First, Respondent argues that Petitioner's software is called ALIKE "alpha", not ALIKE. Respondent is incorrect. Petitioner clearly used **ALIKE** alone to refer to its software in its marketing materials and in connection with the software downloadable from the Itunes store; Kronik Depo., Exs. C-F, U-Y (screenshots of ALIKE available on Itunes and ALIKE marketing materials, all showing ALIKE presented as part of a design without "alpha"). The word *"alpha"* merely refers to the first version of the app. Kronik Depo. at 41-45.

Second, Respondent and his "expert" spent an absurd amount of time and resources attempting to show that Kronik's ALIKE marketing materials are somehow "fraudulent" or "forged" or incomplete in some way. Respondent largely points to the website, which contained "dummy text" in its early stages. The mere fact that some of Petitioner's marketing materials were still in development in 2009 and 2010 does not detract from the clear fact that *Petitioner's app was*

actually downloaded and used by consumers at least as early as September of 2010. Further, Petitioner clearly testified that he attended trade shows and promoted the ALIKE app in 2010. His testimony about promoting ALIKE at trade shows is highly detailed, consistent, and identified specific people who assisted him with promoting ALIKE at the trade shows. Further, this testimony is undisputed by Respondent. Again, Respondent chose to ignore this evidence in his Trial Brief. Simply put, it is undisputed that consumers downloaded Petitioner's ALIKE software since September of 2010, and that Petitioner engaged in extensive promotion of the software online and in person at trade shows as least as early as 2010.

Third, Respondent has given unverified, self-serving testimony that when he tried to use Petitioner's ALIKE app, it did not work. Respondent provided no documentary support for this statement whatsoever, and his brief comments ignore the fact that software applications are not "bug free" and do not "work" perfectly all of the time. Petitioner's ALIKE software, for example, is only available on certain operating systems. Respondent gave no details about which operating system he used when trying the ALIKE software or why he was purportedly unable to use it. Moreover, Respondent's testimony ignores the clear, extensive record of public downloads of ALIKE software as verified by Apple. Apple, of course, accepted Petitioner's ALIKE submission and has made the software available for download since September of 2010.

Accordingly, based on the preponderance of the evidence, Petitioner has established priority of use of ALIKE through undisputed evidence of downloads of the software through the Apple Itunes store at least as early as September 14, 2010.

B. ALIKE and ALIKEU are Likely to Cause Confusion

Petitioner must establish that there is a likelihood of confusion by a preponderance of the evidence. The Board's decision is based upon a determination under Section 2(d) on an analysis of

all of the probative evidence of record bearing on a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("du Pont"). See also In re Majestic Distilling Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

1. The Marks ALIKE and ALIKEU Are Nearly Identical

The marks ALIKE and ALIKEU are virtually identical except for the addition of the letter "U" at the end of Respondent's ALIKEU. This mere addition of a single letter is not enough to avoid a likelihood of confusion, particularly where goods and services are also nearly identical. Because the marks at issue in this case are nearly identical, this first *Dupont* factor weighs heavily in favor of a finding of a likelihood of confusion.

2. The Goods and Services are Highly Related

Petitioner's downloadable social networking software is highly related—and virtually identical to—Respondent's online social networking services. *First*, ALIKE is a social-networking platform for finding friends by similar interests, geographic proximity, and keywords. The software is used for chatting, exchanging media files, joining user groups, and other typical social-media-related functions. Respondent describes his ALIKEU platform as an "online social networking service," which is essentially the same as Petitioner's ALIKE but with a slightly different name. Both services have similar features which allow communicating with others having similar interests, and both will be used by the same types of consumers driven by the same motivation to engage in social networking.

Second, the USPTO agrees that the services are related and there is a likelihood of confusion. Specifically, the USPTO refused Petitioner's trademark application for ALIKE (& Design), Ser. No. 85/595,094, based on a finding of a likelihood of confusion with Respondent's ALIKEU registration. The examining attorney issued two office actions maintaining the refusal,

and each office action included ample evidence that Petitioner's goods and Respondent's services are related. Petitioner's Notice of Reliance, Exs. B-C. The Board should view the USPTO's Section 2(d) refusal and its office action as highly probative of a likelihood of confusion in this case.

Second, Petitioner has submitted numerous third party registrations taken form USPTO's TSDR database showing that downloadable social networking software and online social networking services commonly emanate from the same sources and are therefore related for likelihood of confusion purposes. Petitioner's Notice of Reliance, Ex. D (third party registrations covering on-line social networking services and downloadable social networking software). Third party dual-use registrations are highly relevant to show that the goods and services commonly emanate from the same sources and are therefore related for likelihood of confusion purposes.[1]

Third, Petitioner has submitted numerous Internet screenshots clearly demonstrating that online social networking services commonly have a downloadable counterpart, and are therefore highly related or at least complimentary to each other. Petitioner's Notice of Reliance, Ex. E.[2] For example, the popular on-line social networking services *Facebook*, *LinkedIN*, *eHarmony*, *Twitter*, and *YouTube* all have downloadable software versions of their on-line services. Even Respondent has a downloadable version of his on-line ALIKEU software. This evidence shows that

[1] Respondent objected to Petitioner's evidence of third party registrations on the grounds that the marks shown therein have not been shown to be in use or that consumers are familiar with them. Respondent's Trial Brief at 14. However, these third party registrations are simply offered to show that the goods and services at issue commonly emanate from the same sources. This type of evidence may be considered for this limited purpose, and no proof that the registrations are in use is required.

[2] Respondent objected to the internet materials in Exhibits E to Petitioner's Notice of Reliance on the ground that such evidence is hearsay. However, Petitioner does not offer this evidence for the truth of any matter asserted. Petitioner has merely offered this evidence to show that downloadable social networking software and online social networking services commonly emanate from the same sources and are therefore complimentary or related for the likelihood of confusion purposes.

downloadable social networking software and online social networking services commonly emanate from the same sources and are therefore related. Accordingly, Petitioner's downloadable social networking software and Respondent's online social networking services are highly related for likelihood of confusions purposes. This factors weighs heavily in favor of a finding of likelihood of confusion.

3. The Marketing and Trade Channels Overlap

The marketing and trade channels for Petitioner's ALIKE downloadable software and Respondent's ALIKEU on-line social networking services are exactly the same - both are promoted through Apple's Itunes store. In fact, when consumers search for Petitioner's ALIKE software in the Itunes store, consumers are presented with the option of downloading either Petitioner's ALIKE or Respondent's ALIKEU software. Simply put, both products appear essentially side-by-side in the marketplace. This factor weighs heavily in favor of a finding of likelihood of confusion. These first three *Du Pont* factors—the similarity of the marks, relatedness of the goods, and overlapping marketing and trade channels—are more than sufficient for a finding of likelihood of confusion.

VI. CONCLUSION

Petitioner has presented undisputed facts showing that he used **ALIKE** for downloadable social networking software at least as early as **September 14, 2010**—the first download by consumers as shown by Apple's authenticated business records. This first download was well prior to Respondent's intent-to-use application filing date of **April 25, 2011**, the earliest priority date upon which he can rely. Further, the evidence shows that Respondent's junior mark ALIKEU is likely to cause confusion with Petitioner's senior mark ALIKE. Based on the foregoing, the Petition for Cancellation should be granted, and Registration No. 4094706 for ALIKEU should be

cancelled.

Dated: October 9, 2015

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true and complete copy of the foregoing **PETITIONER'S REPLY BRIEF** has been served on Christine K. Bush, the listed correspondent for Respondent, on October 9, 2015, via First Class U.S. Mail, postage prepaid to:

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